United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

708

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 23,418

United States of America, Appellee,

v.

Willie A. Sams, Jr., Appellant.

On Appeal From a Judgment of the District Court for the District of Columbia

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BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED *

1. Whether the admission of the colored photographs-the government's exhibits 1 and 2 - was an abuse of discretion in that the sole purpose of the photographs was to inflame the jury.

2. Whether the trial judge's actions in constantly directing the

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* This case has not previously been before this Court.

defendant to answer repeated questions on cross-examination and in allowing the Assistant United States Attorney to repeatedly use characterizations, such as "strangulation marks" and"choke marks" in framing questions asked the defendant amounted to a prejudicial intervention and could have led jurors to give undue weight to points treated by the judge.

3. Whether the defendant's pro se Statement of Facts filed in open court at sentencing was sufficient to act as a motion for a new trial on the grounds of newly discovered evidence and should have been granted by the trial court in the interests of justice, and in the alternative whether this court can remand for a determination or reverse the conviction and order a new trial.

REFERENCES TO RULINGS

The judgment by the United States District Court for the District of Columbia after a guilty jury verdict, and the committment to the custody of the Attorney General for imprisonment for a period of thirty years is reproduced in the Duplicate Transcript of Pleadings (D. T. P. 3).

STATEMENT OF THE CASE

In the indictment, filed in the United States District Court for the District of Columbia, the defendant was charged with second degree murder--a violation of Title 22 of the D. C. Code, Sec. 2403 (D. T. P. 10). He was tried by a jury and found guilty, and committed to the custody of the Attorney General for imprisonment for a period of thirty years (D. T. P. 3). An appeal was noted to this Court on August 4, 1969, within the time prescribed by law (D. T. P. 2).

On the night of Saturday, December 7, 1968, the defendant, Willie A. Sams, Jr., went by prearrangement to the home of Octavia Brown to pick up the decedent, Latonia Denise Rinehart, and her two year old sister (R. 21-22, 73). The defendant was to take the two children to their mother's apartment, and was to babysit with them until their mother returned from a "picana" game (R. 22). The defendant, in fact, did take the children to their mother's apartment, and did babysit with them (R. 25). Octavia Brown last saw the decedent alive about 7:00 P. M. on December 7th, and nothing was wrong with the decedent

when she turned the child over to the defendant (R. 73-74). The decedent's mother made a series of telephone calls in fifteen minute intervals after 7:45 P. M. during which she talked to the deceased child (R. 21, 23-25); the child made no complaint of her physical well-being to her mother (R. 26).

At approximately 6:44 A. M. on Sunday, December 8, 1968, Private Brummell of the District of Columbia Fire Department Emergency Ambulance Service with his aide responded to a call at the apartment of the decedent's mother and were met at the door by the defendant (R. 54). The defendant told them that the child had stopped breathing thirty minutes prior to their arrival, and that he had tried artificial respiration and applied ice to her (R. 58). Private Brummell testified that the child had apparent life left when they arrived, and that he observed blue marks on the decedent's neck on both sides and that the child's eyes were dilated quite a bit (R. 57, 59-60, 64). He further testified that when he arrived the defendant, the deceased and her little sister were the only ones in the apartment (R. 66). An autopsy was performed at 11:15A. M. on December 8, 1968, by the Chief Deputy Coroner for the District of Columbia which revealed

extensive bruises on the left and right sides of the neck, bruises along both jaws, hemorrhages in both eyes, and that the medical cause of death was an acute sub-dural hemorrhage which was caused by blood trauma to the right side of the decedent's head (R. 114, 124, 132, 134). Cross-examination revealed that the cause of decedent's injury was more characteristic of a blow than a fall (R. 143). Two colored pictures-government's exhibits number 1 and 2 were, received in evidence without objection and were, in fact, stipulated by the defendant's counsel (R. 95, 125); these pictures were in color showing the decedent's upper chest, neck and head and revealed neck bruises on the left and right sides of the neck (R. 95, 126). The Chief Deputy Coroner was allowed to give an opinion that the child had died three to four hours before he arrived on the scene at 9:00 A. M. (R. 116, 117-120). The doctor was also allowed by the court to state that in his opinion the neck bruises were caused by manual strangulation (R. 129).

Examination of the defendant corroborated the basic facts, but further revealed that he had spanked the decedent on her bottom, and that the child had had trouble breathing

and coughing during the night and that he had performed artificial respiration twice and mouth-to-mouth artificial respiration during the night prior to calling the Rescue Squad (R. 176, 178, 182-183, 204). Cross-examination brought out that the decedent had bumped her head on the side of the table, that he had hit decedent on the side of the face, that a woman came to the apartment during the night, was admitted 2 or 3 steps and left (R. 198, 204, 243). Defendant also stated that he didn't see bruise marks on her neck until Private Brummell had pointed them out to him (R. 245). Over objection the Assistant United States Attorney was allowed to ask the defendant repeated questions using the characterizations of "strangulation marks" and "choke marks" in referring to the bruise marks on the side of deceased's neck (R. 240, 242, 249). The Court further allowed the Assistant United States Attorney to go over the same questions over and over in cross-examining the defendant (R. 220-232, 247-248).

At sentencing on July 25, 1969, defendant filed a sworn Statement of Facts indicating that the deceased's mother had come home during the night, and that she had committed the

crime (D. T. P. 4-5). Apparently the Court did not act on that statement of fact.

SUMMARY OF ARGUMENT

1. The admission of the colored photographs-government's exhibits 1 and 2 was an abuse of discretion by the trial court, because they were strictly cumulative evidence, and because their sole purpose was to inflame the jury. Two witnesses testified before the photographs were introduced that there were bruises on both sides of the neck of the decedent child. The photographs disclose the same fact, and served no other purpose than to inflame the jury, because they showed a deceased child. Harried v. United States, 128 U. S. App. D. C. 330, 389 F. 2d. 281 (1967).

2. The trial judge's actions in constantly directing the defendant to answer repeated questions on cross-examination effectively amounted to a prejudicial intervention by the court on the side of the prosecution and could have led the jury to give undue weight to the points treated by the judge just as if the court had been an active participant in the cross-examination, Jackson v. United States, 117 U. S. App. D. C. 325, 329 F. 2d. 893 (1964). Also, the repeated allowance of the trial court of

questions using characterizations such as "strangulation marks" and"choke marks" on cross-examination of defendant amounted to a prejudicial intervention by the court.

3. The defendant's pro se Statement of Facts filed in open court at sentencing was sufficient to act as a motion for a new trial on the grounds of newly discovered evidence and should have been determined by the trial court. Rule 33, Federal Rules of Criminal Procedure. This court can remand for a determination of where the truth lies including if necessary a new trial, United States v. Shotwell Mfg. Co., 355 U. S. 233, 78 S. Ct. 245, 2 L. Ed. 2d. 234 (1957), and Communist Party v. Subversive Activities Control Board, 351 U. S. 115, 76 S. Ct. 663, 100 L. Ed. 1003 (1956), or this court can reverse the conviction of the defendant and remand for a new trial, Mesarosh v. United States, 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 2d. 1 (1956).

ARGUMENT

I

THE ADMISSION OF THE COLORED PHOTOGRAPHS- THE GOVERNMENT'S EXHIBITS 1 AND 2- WAS AN ABUSE OF DISCRETION IN THAT THE SOLE PURPOSE OF THE PHOTOGRAPHS WAS TO INFLAME THE JURY.

The Court's attention is directed to the following pages of

the record p. 60, p. 95, pp. 125-126.

During the trial counsel for the defendant and the Assistant United States Attorney stipulated to two color photographs showing the decedent's upper chest, neck and head (R. 95, 125-126). In fact, the colored photographs revealed neck bruises on the left and right sides of the neck of the child (R. 126). These photographs were introduced after the Chief Deputy Coroner was allowed to testify that there were extensive bruises along both jaws, both sides of the neck at the angle of the jaw, and that there were hemorrhages in both eyes (R. 124). Private Brummell also had previously testified as to the bruises on both sides of the neck (R. 60). Therefore, the introduction of the photographs was cumulative, and their only purpose was to inflame the jury; this conclusive is reinforced by the fact that they were color photographs-not black and white photographs.

The case of Harried v. United States, 128 U. S. App. D. C. 330, 389 F. 2d. 281 (1967) involved black and white photographs. However, in that case the court stated the principles of law as follows:

> Appellant also contends that the failure to object to the admission of certain photographs demonstrates ineffective assistance of counsel. We disagree. The photographs are those of the body as found by the police. The photographs in question here evidenced the mode of death by strangulation and stab wounds in the neck. Photographs of the body are admissible so long as they have some probative value and are not intended solely to inflame the jury. There was no abuse of discretion in admitting this evidence.

In the instant case the jury had the testimony of two witnesses before it as to the bruises on both sides of the neck. There was no need of cumulative evidence as to the strangulation. Therefore, the only purpose to be served by the colored photographs was to inflame the jury. This conclusion is reinforced by the fact that there was no showing that the pictures were accurate reproductions.

II

> THE TRIAL JUDGE'S ACTIONS IN CONSTANTLY DIRECTING THE DEFENDANT TO ANSWER REPEATED QUESTIONS ON CROSS-EXAMINATION, AND IN ALLOWING THE ASSISTANT UNITED STATES ATTORNEY TO REPEATEDLY USE CHARACTERIZATIONS, SUCH AS "STRANGULATION MARKS" AND "CHOKE MARKS" IN FRAMING QUESTIONS ASKED THE DEFENDANT AMOUNTED TO A PREJUDICIAL INTERVENTION, AND COULD HAVE LED JURORS TO GIVE UNDUE WEIGHT TO POINTS TREATED BY THE JUDGE.

The Court's attention is directed to the following pages of the record p. 129, pp. 220-232, p. 240. p. 242, pp. 247-249, and p. 32 in the record prepared by Phyllis P. Harper.

The case of Jackson v. United States, 117 U. S. App. D. C. 325, 329 F. 2d. 893 (1964) dealt with a claim of undue intervention in the trial by the judge in a manner prejudicial to the defendant. The Jackson case dealt with a situation in which the trial judge took an active participation by cross examining witnesses. The Court recognized the difficulty of counsel having to take questions of the trial judge out of context; in that case the court examined the entire transcript of the trial in order to evaluate the defendant's claim. The Court recognized the cumulative impact of the trial judge's participation. The Court in this regard said:

> At best it is difficult on appellate review to appraise the impact of intervention by the presiding judge and determine whether his participation exceeded permissible bounds. However, this transcript reveals what seems to us an inordinate number of instances of extensive examination and cross examination of witnesses and comments by the Court. Fairly read, no single comment or question, or line of questioning, can be regarded as prejudicial, but the cumulative impact of all the trial judge's activist participation could well have been prejudicial at the very least and could have led jurors to give undue weight to points treated by the judge . . .

The court further stated that in a jury case, as opposed to non-jury, the trial judge should exercise restraint and caution because of the possible prejudicial consequences of the presider's intervention.

In the instant case it is conceded that the trial judge did not question defendant; however, the judge did in instance after instance direct the defendant to answer the same questions over and over again in slightly revised form.[1/] The only possible purpose that could have been served by this action was to convey to the jury the impression that the court did not believe the defendant's testimony with regard to the measures of assistance that he rendered the deceased child. The time sequence from when the defendant first started rendering assistance to the decedent was gone over time-after-time in the record (see especially R. 220-232).

A further example of the trial judge's actions in constantly directing the defendant to answer the same question in a slightly revised form is shown at R. 247-248. In addition the trial judge allowed the prosecutor to use the characterizations of

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1/ See R. 220-232, as more thoroughly brought out in the Addendum to Appellant's Brief, infra, pp. 17 and 18.

"strangulation marks" and"choke marks" over objections of defense counsel during cross-examination of the defendant on three different occasions (R. 240, 242, 249) even though the only witness testifying before that time that the bruises were caused by manual strangulation was the Chief Deputy Coroner (R. 129). The jury was not at this point bound by the Coroner's opinion, or was it ever bound by this opinion; the trial judge realized the jury was not bound when it gave an expert witness instruction at page 32 of the Record as prepared by Phyllis P. Harper. Thus, the action of the court in so allowing such characterizations prejudiced the defendant in the jury's eyes.

III

THE DEFENDANT'S PRO SE STATEMENT OF FACTS FILED IN OPEN COURT AT SENTENCING WAS SUFFICIENT TO ACT AS A MOTION FOR A NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE AND SHOULD HAVE BEEN GRANTED BY THE TRIAL COURT IN THE INTERESTS OF JUSTICE, AND IN THIS CASE THIS COURT CAN REMAND FOR DETERMINATION OF WHERE THE TRUTH LIES INCLUDING A NEW TRIAL OR CAN REVERSE DEFENDANT'S CONVICTION AND REMAND FOR A NEW TRIAL.

The Court's attention is directed to the Duplicate Transcript of Pleadings pp. 4-5, and to the docket entries of this case in the United States District Court for the

District of Columbia on July 25, 1969, and to the record.

On July 25, 1969, the day of sentencing, the defendant filed his sworn Statement of Facts in which his counsel did not join. The substance of the Statement of Facts was that the defendant prior to July 25, 1969 had not disclosed to the trial court or to the defense counsel that the deceased's mother had come home on the night of the homicide, and was responsible for the child's death (D. T. P. 4). Since the date of sentencing was more than 7 days after the date of the guilty verdict (June 20, 1969; see D. T. P. 7), this Statement of Facts could not be considered as a motion for a new trial on any other ground except on the ground of discovery of new evidence. Rule 33 of the Federal Rules of Criminal Procedure provides in part:

> Rule 33. New Trial.
>
> The court on motion of a defendant may grant a new trial to him if required in the interest of justice . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

It is conceded by counsel for the defendant, that research has disclosed no case involving an attempted repudiation by the defendant of a material fact; however, cases have been found discussing changes in or challenges to testimony of officers of defendant corporations or co-defendants, e. g., United States v. Shotwell Mfg. Co., 355 U. S. 233, 78 S. Ct. 245, 2 L. Ed. 2d. 234 (1957). In the Shotwell case the court remanded the case to the trial court for a full exploration of where the truth lies (between the testimony of several officers of the corporation and who are also defendants, and an affidavit filed by a co-defendant officer), because the integrity of the judicial process demands no less. Defendant contents that the trial judge should have acted on his Statement of Facts. The docket entries for July 25, 1969 do not reveal any action by the court, nor does the Duplicate Transcript of Pleadings. The interests of justice require that a determination be made of defendant's claim, because if it is determined to be true an innocent man is serving a thirty year sentence for a crime he did not commit.

Such determination can be made by the trial court following cases, United States v. Shotwell Mfg. Co., 355 U. S. 233, 78 S. Ct. 245, 2 L. Ed. 2d. 234 (1957) (remand to the trial court for a determination of where the truth lies

including if necessary a new trial), Communist Party v. Subversive Activities Control Board, 351 U. S. 115, 76 S. Ct. 663, 100 L. Ed. 1003 (1956) (remand to the board for a determination of where the truth lies including if necessary a new hearing), or this court can reverse the conviction of the defendant and remand for a new trial, Mesarosh v. United States, 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 2d. 1 (1956).

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of Columbia should be reversed, or the case should be remanded for a determination of the truth of the defendant's Statement of Facts including if necessary a new trial, or this court should reverse the conviction of the defendant and remand for a new trial.

Respectfully submitted,

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ADDENDUM

1/ See R. 220-232, where the court directed the defendant to answer the following questions:

At p. 220:

> Q. So then, after you gave her this second bit of assistance, you did nothing further again, in terms of calling for help; right?
>
> Q. And after the second application, you felt again she responded satisfactorily?

At p. 221:

> Q. What did you do when you left the room?

At p. 222:

> Q. Sir, tell the ladies and gentlemen of the jury, if you can, why, having felt it necessary to give this young girl artificial respiration on two separate occasions, in a period of just a few minutes, you didn't immediately call the assistance of the District of Columbia Fire Department Ambulance Service.

At p. 223:

> Q. It is not a unusual situation to have to give a four-year-old child artificial respiration, sir?

At p. 224:

> Q. But you didn't call for assistance right after you had given her artificial respiration the second time, did you?

At p. 226:

> Q. What did you do then?

At pp. 227-228:

Q. That situation being that she was having more trouble, or what?

At p. 228:

Q. [I applied assistance] In what form?

At p. 229:

Q. What work did you do with her?

At p. 229:

Q. What assistance?

At p. 230:

Q. And what further assistance did you give her other than that?

At p. 232:

Q. Is that what you were observing when you went back into that room at that moment?